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No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1956

THOMAS E. POLLARD, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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AUGUST 24, 1956.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Fifth Amendment	3
Sixth Amendment	4
18 U.S.C. § 1702	4
Rule 32, Federal Rules of Criminal Procedure	4
Rule 45, Federal Rules of Criminal Procedure	4
Probation Act (18 U.S.C. § 3651 and § 3653)	5
Statement of the Case	6
Summary of Argument	17
Argument:	
I. By virtue of the Fifth Amendment's prohibition against double jeopardy, it was unconstitutional for the district court in September 1954 to impose a prison sentence on petitioner after having previously determined in October 1952 that petitioner should not be subject to imprisonment, or to probation in lieu of imprisonment, for this offense	21
II. The imposition of a prison sentence in September 1954, such a long time after the plea of guilty entered in September 1952, violated petitioner's constitutional right under the Sixth Amendment to a speedy trial	26
III. The imposition of a prison sentence in September 1954 deprived petitioner of his liberty in violation of the Due Process Clause of the Fifth Amendment	30
IV. Even apart from constitutional considerations, the imposition of a prison sentence upon petitioner in September 1954 was such a serious departure from proper standards of criminal law administration as to require corrective action	31
Conclusion	34

TABLE OF AUTHORITIES

CASES:

	Page
Adkins v. *DuPont Co.*, 335 U.S. 331 (1948)	2
Affronti v. *United States*, 350 U.S. 79 (1955)	22
Aspden's Appeal, 24 Pa. 182 (1854)	29
Ballard v. *United States*, 329 U.S. 187 (1946)	33
Beavers v. *Haubert*, 198 U.S. 77 (1905)	30
Blockburger v. *United States*, 284 U.S. 299 (1932)	21
Bozza v. *United States*, 330 U.S. 160 (1947)	24, 25
Bradley, In re, 318 U. S. 50 (1943)	24
Brown v. *Allen*, 344 U.S. 443 (1953)	33
Cooper v. *United States*, 91 F.2d 195 (5th Cir. 1937)	30
Couch v. *United States*, (D.C. Cir., June 7, 1956)	15
Delaney v. *United States*, 199 F.2d 107 (1st Cir. 1952)	33
DeMaggio v. *Coxe*, 70 F.2d 840 (2d Cir. 1934)	25
Fiswick v. *United States*, 329 U.S. 211 (1946)	17
Frankel v. *United States*, 131 F.2d 756 (6th Cir. 1942)	33
Harris v. *State*, 46 So.2d 923 (Miss. 1950)	29
Hiatt v. *Brown*, 339 U.S. 103 (1950)	2
Hill v. *Wampler*, 298 U.S. 460 (1936)	22, 23
Holiday v. *Johnston*, 313 U.S. 342 (1941)	2
Hunter v. *United States*, 149 F.2d 710 (6th Cir. 1945)	23
Lange, Ex parte, 18 Wall. 163 (1874)	24
Lisenba v. *California*, 314 U.S. 219 (1941)	31
McNabb v. *United States*, 318 U.S. 332 (1943)	33
Mercado v. *United States*, 183 F.2d 486 (1st Cir. 1950)	17
Miller v. *Aderhold*, 288 U.S. 206 (1933)	28
Murchison, In re, 349 U.S. 133 (1955)	34
Nichols v. *United States*, 106 Fed. 672 (8th Cir. 1901)	25
Offutt v. *United States*, 348 U.S. 11 (1954)	33, 34
Oliver, In re, 333 U.S. 257 (1948)	29
Provoo, Petition of, 17 F.R.D. 183 (D.Md. 1955), affirmed, 350 U.S. 857 (1955)	28, 29
Rea v. *United States*, 350 U.S. 214 (1956)	33
Reed v. *The State*, 147 Ind. 41, 46 N.E. 135 (1897)	29

Page

Roberts v. *United States*, 320 U.S. 264 (1943) 26
Rochin v. *California*, 342 U.S. 165 (1952) 31
Rosenberg v. *United States*, 346 U.S. 273 (1953) 22
Rowley v. *Welch*, 114 F.2d 499 (D.C. Cir. 1940) 25
Russell v. *United States*, 119 F.2d 686 (8th Cir. 1941) 22
Rutledge v. *United States*, 146 F.2d 199 (5th Cir. 1944) 24
Schwab v. *Berggren*, 143 U.S. 442 (1892) 13
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 13
Spriggs v. *United States*, 225 F.2d 865 (9th Cir. 1955) 21
State v. *Nathans*, 49 S.C. 199, 27 S.E. 52 (1897) 29
State v. *Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867 (1907) 29
Steffler v. *United States*, 319 U.S. 38 (1943) 2
United States, Ex parte, 242 U.S. 27 (1916) 22, 23
United States v. *Benz*, 282 U.S. 304 (1931) 24
United States v. *Carignan*, 342 U.S. 36 (1951) 33
United States v. *Hayman*, 342 U.S. 205 (1952) 2, 16, 17
United States v. *Henning*, 15 F.2d 760 (9th Cir. 1926) 29
United States v. *Morgan*, 346 U.S. 502 (1954) 17
United States v. *Provoo*, 350 U.S. 857 (1955) 28
United States v. *Rosenberg*, 195 F.2d 583 (2d Cir. 1952) 21
United States v. *Smith*, 331 U.S. 469 (1947) 27
United States v. *Whitehead*, 64 F. Supp. 57 (E.D.Ky. 1946) 21
Upshaw v. *United States*, 335 U.S. 410 (1948) 33
Walton v. *United States*, 202 F.2d 18 (D.C. Cir. 1953) 25
Watkins v. *Merry*, 106 F.2d 360 (10th Cir. 1939) 21
Williams v. *New York*, 337 U.S. 241 (1949) 22
Williams v. *United States*, 188 F.2d 41 (D.C. Cir. 1951) 17
Wilson v. *Bell*, 137 F.2d 716 (6th Cir. 1943) 21
Wilson v. *United States*, 145 F.2d 734 (9th Cir. 1944) 23
Wright v. *The State*, 103 Ala. 95, 15 So. 506 (1894) 29

CONSTITUTION AND STATUTES:

	Page
Constitution, Fifth Amendment, Double Jeopardy Clause	3, 18, 21, 31
Constitution, Fifth Amendment, Due Process Clause,	3, 18, 19, 30, 31
Constitution, Sixth Amendment, Speedy Trial Clause	3, 4, 18, 19, 26, 31
Constitution, Fourteenth Amendment	13
12 U.S.C. § 588b(b)	23
18 U.S.C. § 1702	2, 4, 6, 18, 22, 23
18 U.S.C. § 2117 (formerly 18 U.S.C. § 320)	23
18 U.S.C. § 3651	5, 25, 26
18 U.S.C. § 3653	5
26 U.S.C. § 2833(a) of 1940 edition, U.S. Code	24
28 U.S.C. § 1651(a)	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2101(c)	2
28 U.S.C. § 2255	6, 16
Revised Statutes, § 5209	22

MISCELLANEOUS:

Rule 32(a), Federal Rules of Criminal Procedure,	4, 15, 19, 27, 28, 32
Rule 37(a)(2), Federal Rules of Criminal Procedure	15, 17
Rule 44, Federal Rules of Criminal Procedure	15
Rule 45 (c), Federal Rules of Criminal Procedure	4, 27
Rule 22, Rules of the Supreme Court	2

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OPINIONS BELOW

There are no opinions below, except to the extent that statements of grounds are included in the various orders which were entered respectively by the district court (R. 16-17, 18, 26, 27-29) and by the court of appeals (R. 24). The orders of both courts are unreported.

JURISDICTION

This is a proceeding to vacate a sentence imposed in a federal criminal case. The order of the court of appeals, denying petitioner's motion for leave to appeal in forma

pauperis from the district court's denial of his motion to vacate, was entered on June 23, 1955 (R. 24). The petition for writ of certiorari, together with a motion to proceed in forma pauperis, was filed in this Court on July 8, 1955. Thus the petition for certiorari was timely, regardless of whether the thirty-day period of Rule 22, paragraph 2, of the Rules of this Court is applicable to the case, or whether, as would appear to follow from this Court's decision in *United States* v. *Hayman*, 342 U.S. 205, 209 note 4 (1952), the ninety-day period of 28 U.S.C. § 2101(e) is applicable. Jurisdiction exists under 28 U.S.C. §1254(1), see *Hiatt* v. *Brown*, 339 U.S. 103, 106, note 1 (1950), as well as under 28 U.S.C. § 1651(a), see *Holiday* v. *Johnston*, 313 U. S. 342, 348, note 2 (1941); *Steffler* v. *United States*, 319 U.S. 38 (1943); *Adkins* v. *DuPont Co.*, 335 U.S. 331 (1948). This Court granted certiorari on February 27, 1956.

QUESTIONS PRESENTED

In September 1952 petitioner pleaded guilty to an offense charged under 18 U.S.C. §1702, a statute which provides that offenders shall be fined not more than $2,000 or imprisoned not more than five years, or both. When petitioner was brought before the court for sentencing on October 3, 1952, the trial judge—on the only rational interpretation of the record which seems open—determined that no imprisonment and no probation should be imposed on petitioner. Later that day, however, at the urging of the Government, and without bringing petitioner back before the court, the trial judge purported to determine instead that petitioner should be placed on probation for three years. The Solicitor General has conceded that this purported probation order, pursuant to which petitioner was subjected to nearly two full years of probation surveillance, was invalid. In September 1954 petitioner was brought back before the trial judge because of alleged violation of

the purported probation, and was thereupon sentenced to two years imprisonment for the original offense. After being sent off to prison petitioner filed a motion to vacate the prison sentence. The denial of his motion, which is now being reviewed, presents the following questions:

1. Whether the imposition of a prison sentence in September 1954 violated the Double Jeopardy Clause of the Fifth Amendment, in view of the previous determination of the trial judge, when petitioner was present in open court on October 3, 1952, that no imprisonment and no probation should be imposed.

2. Whether the imposition of a prison sentence in September 1954, such a long time after the plea of guilty entered in September 1952, violated petitioner's constitutional right under the Sixth Amendment to a speedy trial.

3. Whether the imposition of a prison sentence in September 1954 deprived petitioner of his liberty in violation of the Due Process Clause of the Fifth Amendment.

4. Whether, even apart from constitutional considerations, the imposition of a prison sentence in September 1954 was, under the circumstances disclosed by this record, such a serious departure from proper standards of criminal law administration as to require corrective action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides, in part:

"nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor

be deprived of life, liberty, or property, without due process of law;''

2. The Sixth Amendment to the Constitution of the United States provides, in part:

''In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .''

3. The statute, 18 U.S.C. §1702, defining the offense to which petitioner pleaded guilty, provides:

''Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.''

4. Rule 32 of the Federal Rules of Criminal Procedure provides, in part:

''(a) Sentence. Sentence shall be imposed without unreasonable delay. . . .

* * * * * * *

''(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.''

5. Rule 45(c) of the Federal Rules of Criminal Procedure provides:

"Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding."

6. The federal probation statute provides in part (18 U.S.C. §3651):

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

"Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

"The court may revoke or modify any condition of probation, or may change the period of probation.

"The period of probation, together with any extension thereof, shall not exceed five years."

It also provides in part (18 U.S.C. §3653):

"As speedily as possible after arrest the probationer shall be taken before the court for the district having

jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

STATEMENT OF THE CASE

On February 11, 1955, pursuant to 28 U.S.C. §2255, petitioner filed in the District Court for the District of Minnesota (Minneapolis Division) a motion to vacate the sentence and judgment by virtue of which he was then imprisoned in the United States Penitentiary at Leavenworth (R. 13-16). The question now presented is whether the denial of this motion to vacate, without any hearing whatsoever, was justified.

The facts of the case are relatively simple. They are also very disturbing, for they reflect extremely loose and unfair practices in the administration of the criminal law.

On July 17, 1951, a complaint was filed against petitioner in the District Court for the District of Minnesota, alleging a violation of 18 U.S.C. §1702, a statute which makes offenders subject to a fine of not more than $2,000 or imprisonment for not more than five years or both. The violation alleged was that on or about May 21, 1951, petitioner had taken a letter from the mail and had opened the letter and removed the [illegible] from a U. S. Treasury check in the amount of $192.29 (R. 2). On September 8, 1952, petitioner waived indictment (R. 3). On the same day an information was filed charging him with the offense and petitioner pleaded guilty, imposition of sentence being deferred by Judge Joyce for pre-sentence investigation (R. 3-4, 30).

Several weeks later, on October 3, 1952, the case came on before Judge Joyce for sentencing (R. 4-6). The transcript shows that the judge had been informed by the pre-sentence

report that petitioner was at that time serving a sentence in the Minnesota State Prison at Stillwater, Minnesota, from which petitioner was scheduled to be paroled in the near future. At the hearing the Government was represented by Ronald E. Hachey, Esq., Assistant United States Attorney (R. 4). Petitioner appeared without counsel; indeed, petitioner has appeared without counsel at all stages of this case (R. 4, 6, 11, 12, 15, 17, 23, 25, 27) until this Court, subsequent to the granting of the petition for writ of certiorari, appointed petitioner's present counsel.

The case in its present posture turns largely on a clear understanding of just what occurred at this hearing on October 3, 1952, during the time while petitioner was present. Since the transcript itself is reasonably short, it will be set forth in full. What it shows is the following (R. 4-6):

"Mr. Hachey: Next matter is United States versus Thomas E. Pollard. This matter is here for sentencing, your Honor. At this time the Government moves for sentencing of the defendant.

"The Court: You are presently in Stillwater?

"The Defendant: Yes, sir.

"The Court: How long have you been there?

"The Defendant: Thirteen months, sir.

"The Court: Have you any craving or desire for a drink now?

"The Defendant: None whatsoever.

"The Court: You are about 35?

"The Defendant: Yes, sir.

"The Court: I suppose that you are an age where you realize now the futility, don't you?

"The Defendant: Yes, very much so, your Honor.

"The Court: The report shows that you have taken a very active interest in the AA organization in the prison.

"The Defendant: I have, sir.

"The Court: And that you contemplate doing that when you get out?

"The Defendant: I do.

"The Court: The report also shows that you won't get out until 1953 sometime.

"The Defendant: December, 1953 is my discharge date.

"The Court: When do you have an opportunity for going before the parole?

"The Defendant: Next month—I was given *given* three months in August, a three month waiting term, period, in August.

"The Court: There was one thing you did, as shown in this probation report, which appealed to me. I realize that you had been on a protracted spree when you stole this government check, but when you sobered up long enough to understand what you had done, you went to one of the officers of the Alcoholics Anonymous and told him what you had done and you sought to make amends insofar as you then could do. You told the FBI the circumstances, without any effort on your part to minimize the offense; in fact you had been drinking for some two weeks continually.

"You are now 35 years of age.

"The Defendant: Yes, sir.

"The Court: You ought to know the misery and the grief and the sorrow and the horror of what continued drinking on your part will bring to you.

"If I might suggest to you, and I am giving you gratuitous advice but it is the result of observation and experience—it is my view that when you get out you should immediately join the Alcoholics Anonymous organization—not wait a week or two weeks or three

weeks—but have that your first mission after you contact your family, and do what they tell you to do and do it immediately and do it diligently and faithfully, carry out every obligation that they impose upon you. With your background and with your ability I think that you can win this fight.

"If you don't do those things, and if you want to revert to drinking, you will be back here again because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again.

"So, good luck to you and I hope the parole board will you give you an opportunity.

"That is all.

"The Defendant: Thank you very much, sir."

From the transcript alone it is clear that this is the entire proceeding which occurred while petitioner was present, for the transcript then goes on to state (R. 6):

"(Other criminal matters were then presented to the Court.)"

Thus the transcript not merely fails to refute, but instead it furnishes confirmation for, the allegations set forth in petitioner's motion to vacate, to the effect that (R. 13):

"at no time or in any instance in the petitioner's presence did Judge Joyce cite, refer or allude to or specify a sentence of any nature or description. Petitioner further states that he, as well as his wife, a close and interested personal friend and two officials of the Minn. State Prison who were all present in the court-room, was under the impression that petitioner's case was dismissed in that no sentence was handed down and petitioner was not remanded for a further hearing."

There is nothing in the record which in any way challenges these factual allegations of petitioner's motion to vacate; indeed, the latest order of the district court, dated December 29, 1955 (which denied petitioner's application to be furnished certain transcripts for use in connection with the petition for certiorari then pending in this Court) assumes what petitioner says to be true (R. 29).

Accordingly, to sum up what happened while petitioner was present in court on October 3, 1952, the judge carefully considered petitioner's case and his history. Having done so, the judge imposed neither a sentence of imprisonment nor probation. Instead the record—on the only rational interpretation of it that seems open—shows that the judge decided that when petitioner should emerge shortly thereafter from the Minnesota State Prison at Stillwater, petitioner was to be a free man so far as the federal authorities were concerned. The judge did, however, expressly admonish petitioner against committing some new federal offense, saying (as shown above) that if petitioner reverted to drink petitioner would be back "because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again." The judge did not say that petitioner might be back for violation of probation, nor in any other way allude to probation or to suspending the imposition of sentence for the purpose of putting petitioner on probation. Thus it is perfectly evident from the record that the judge had no intention to put petitioner on probation.

But although the transcript (as shown above) makes it clear that Judge Joyce ended by saying to petitioner "That is all", nevertheless this was not all which occurred in court on October 3, 1952, relating to petitioner's case. Later in the day, after petitioner was no longer present in court, the Assistant United States Attorney, acting *ex parte*, prompted the judge into having a second and entirely

different thought about the matter, and in petitioner's absence the judge then purported to determine that petitioner should be put on probation. According to petitioner's motion to vacate, this further action by the court first came to petitioner's attention in the following manner (R. 13-14):

> "Petitioner states that he was paroled from the Minn. State Prison on the day before Thanksgiving, 1952 and at this time was informed by prison officials that he was to report to the Federal Probation Office in Minneapolis, Minn. When petitioner inquired of the prison officials as to why it was necessary for him to report to said office he was informed that they did not know but that they would investigate. After the prison officials had conversed by telephone with the federal probation office in Minneapolis, petitioner was notified that, although petitioner *was not present at time of sentencing,* and *entirely* (until this time) *unknown to him,* he had been 'sentenced' to three (3) years probation . . ."

These allegations in petitioner's motion to vacate have not been denied, nor are they contradicted by anything in the record. On the contrary, they are supported by the certified transcript, which shows that, after petitioner's hearing on October 3, 1952, had been concluded, the court turned to other criminal matters, and then later in the day was brought back to petitioner's case, as follows (R. 6):

> "(Other criminal matters were then presented to the Court).
>
> "The Court: Is there anything else, Mr. Hachey?
>
> "Mr. Hachey: Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary

period after his release from Stillwater, or any type of sentencing?

"The Court: It is to commence at the expiration of sentencing at Stillwater.

"Mr. Hachey: Probation to commence after expiration of his sentencing at Stillwater—for how long?

"The Court: Three years."

The record likewise includes a purported "Judgment and Order of Probation", dated October 3, 1952, which contains the following (R. 6-8):

> "It is adjudged that imposition of sentence be, and the same is hereby suspended, and defendant is placed on probation to the United States Probation Officer for a period of three (3) years; said probation to commence immediately after his release from Stillwater Penitentiary, Stillwater, Minnesota.
>
> "It is further ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.
>
> "It is further rdered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer."

There is no showing that a copy of this order was ever delivered to petitioner. In any event, this "Judgment and Order of Probation" was obviously invalid; the Solicitor General has already so admitted in this Court (Memorandum for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari, page 3), although the Solicitor General apparently takes the view (contrary

to petitioner's) that the sole ground of invalidity is that petitioner was not present in court when the judgment was pronounced.[1]

Petitioner's motion to vacate alleges, and it is nowhere denied or contradicted, that petitioner, when he initially reported to the federal probation officer, inquired how he could possibly be on probation; that the probation officer succeeded in convincing petitioner that the "sentence" was legal; that petitioner again brought up the question with the probation officer about a year later; that the probation officer, after looking into it, informed petitioner that petitioner's allegations were "entirely true"; that further conversation with the probation officer led petitioner to believe that it would not be wise to pursue the matter further, petitioner having no knowledge as to what further complications he might or could become involved in (R. 14).

On September 1, 1954, nearly two full years after the hearing of October 3, 1952, and on the basis of a report from the federal probation officer that petitioner had violated the terms of his probation,[2] Judge Joyce directed that petitioner be arrested and brought before the court (R. 8-9). Petitioner was accordingly arrested on September 15, 1954 (R. 10) and was brought before Judge Joyce for a hearing

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[1] "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with." *Schwab* v. *Berggren*, 143 U.S. 442, 448 (1892). For cases coming up from State courts under the Fourteenth Amendment, a narrow, specific exception (in a situation where the jury is taken out for a view) was made to this rule, by a bare majority of this Court, in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934), but neither in the *Snyder* opinion nor elsewhere has it been suggested that a sentence could constitutionally be imposed by the trial court in the absence of the accused.

[2] Petitioner's motion to vacate states this was "because of petitioner's excessive drinking" (R. 14).

on September 21, 1954 (R. 11). At the hearing the Government was represented by Harold Evarts, Esq., Assistant United States Attorney; petitioner, as before, was not represented by counsel (R. 11). The proceedings were extremely brief. In their entirety they consisted of the following:

> "Mr. Evarts: If it please the Court, the first matter is United States vs. Thomas E. Pollard. The defendant, Your Honor, is before the Court at this time and is not represented by counsel, is that correct?
>
> "The Defendant: That's correct.
>
> "Mr. Evarts: You understand you have the right to be represented by counsel?
>
> "The Defendant: Yes, sir, I do.
>
> "Mr. Evarts: Is it your desire to waive that right?
>
> "The Defendant: Yes, sir. It is.
>
> "The Court: What I am going to do in your case, because of the record, is to sentence you in the first instance: It's the judgment of the Court that you be confined in an institution to be selected by the Attorney General of the United States for a period of two years. That's all.
>
> "Mr. Evarts: Now, Your Honor, as you recall, the record shows that he was, sentence was imposed on October 3, 1952, and I would suggest to the Court that an order be made setting aside the judgment and commitment that was entered at that time so that the record will now truly reflect the status of the events.
>
> "The Court: All right."

From the foregoing it will be seen that the judge paid scant regard to the standards prescribed for such a proceeding. For example, he allowed the Assistant United States Attorney to elicit by a question the answer that petitioner desired

to waive the right to counsel, but (contrary to what is contemplated by Rule 44 of the Federal Rules of Criminal Procedure) the judge himself neither informed petitioner of his right to counsel nor informed petitioner that the court would assign counsel to represent petitioner unless petitioner elected to proceed without counsel or was able to obtain counsel.[3] Furthermore, the judge totally ignored the mandatory requirement of Rule 32(a) of the Federal Rules of Criminal Procedure, to the effect that: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."[4] In addition, the judge completely disregarded the principle embodied in Rule 37(a)(2) of the Federal Rules of Criminal Procedure, which specifies that: "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal. . . ." But worse than all these things, the judge imposed a two-year prison sentence when, for the reasons

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[3] Thus the transcript shows conclusively the inaccuracy of the formal recital which appears in the court's judgment and commitment, dated September 21, 1954, to the effect that "the Court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court . . . ." (R. 12).

[4] Compare *Couch* v. *United States*, Nos. 12972-3, decided June 7, 1956, by the United States Court of Appeals for the District of Columbia Circuit. Thus the transcript also conclusively shows to be untrue the further formal recital, on the printed form (Cr. Form No. 25d) used for the court's judgment and commitment, dated September 21, 1954, to the effect that "the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court" (R. 12). It apparently takes considerably more than a printed form of court order to carry into effect the specific safeguards which the Federal Rules of Criminal Procedure are intended to make a living reality for all defendants in federal criminal cases.

which will be set forth in this Brief, it was no longer within the judge's power to do so.

The record also shows that later in the day on September 21, 1954, in keeping with what he had done at this hearing, Judge Joyce signed a formal judgment and commitment (R. 12), sentencing petitioner to two years' imprisonment and setting aside the judgment and order of probation which had been entered on October 3, 1952.

On February 11, 1955, petitioner, stating that he was a layman, unlearned in the law and begging the Court's indulgence in the matter of form, filed his motion to vacate (R. 13-15). The significant factual allegations in the motion, as well as the court records pertaining to them, have been recited above. In his motion petitioner contended that he was at no time sentenced to the three years' probationary sentence; that his two-year prison sentence was illegal and unconstitutional; that he should be immediately released; and that it is illegal and unconstitutional to sentence an American citizen "in absentia" and without affording him an opportunity to speak in his own behalf (R. 15). By order dated March 23, 1955, without holding any hearing, Judge Joyce denied the motion to vacate, finding that petitioner "was initially sentenced upon September 21, 1954, and the files and records in the case conclusively show that said judgment was within the jurisdiction of the court and the sentence imposed was valid and in accordance with law" (R. 16-17).

On April 4, 1955, there was filed in the district court petitioner's notice of appeal [5] and also his motion for leave to

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[5] There is no question that the appeal was timely, having been filed within the sixty-day period applicable to habeas corpus cases, since as this Court decided in *United States* v. *Hayman*, 342 U.S. 205, 209, note 4 (1952): "Appeals from orders denying motions under § 2255 are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions. See Mercado v.

appeal in forma pauperis (R. 17-18); such leave was denied by Judge Joyce on April 18, 1955 (R. 18). Thereafter petitioner moved, in the Court of Appeals for the Eighth Circuit, for leave to prosecute his appeal in forma pauperis (R. 19-23). On June 23, 1955, stating that "The Court has examined the original files in the United States District Court", the court of appeals entered an order denying the motion (R. 24). The petition for a writ of certiorari was filed in this Court on July 8, 1955. On February 27, 1956, this Court granted leave to proceed in forma pauperis and granted the petition for writ of certiorari (R. 32). 350 U.S. 965. On March 5, 1956, this Court appointed petitioner's present counsel to serve as counsel in the case. 350 U.S. 980.

Later in March 1956, on the basis of the good-time credits he had earned, petitioner was released from Leavenworth and the service of his sentence was deemed completed.[6]

SUMMARY OF ARGUMENT

The record in this case discloses an extraordinary disregard of the principles which govern the sound and fair

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United States, 183 F.2d 486 (1st Cir. 1950)." Indeed, even if the shorter ten-day period of Rule 37 (a) (2) of the Federal Rules of Criminal Procedure had been applicable (which, under the *Hayman* decision, it plainly was not), petitioner's appeal would still have been timely, since on March 31, 1955, well within the ten-day period, petitioner, being then in custody in the United States Penitentiary at Leavenworth, Kansas, executed his appeal papers before a notary public at that institution for transmission to the court (R. 17-18). See *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951), and cases cited.

[6] Under the decisions of this Court it is clear that this fact does not make the case moot. *Fiswick* v. *United States*, 329 U.S. 211, 220-223 (1946); *United States* v. *Morgan*, 346 U.S. 502, 512-513 (1954). As the Court said in the *Morgan* case, "the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected" (346 U.S. at 512-513).

administration of the criminal law. The imposition of a prison sentence upon petitioner in September 1954 involved serious violations of his constitutional rights, requiring a reversal of the judgment, although it may be more appropriate for the case to be decided in petitioner's favor without actually reaching the constitutional grounds.

The constitutional grounds rest upon three separate clauses of the Constitution—the Double Jeopardy Clause of the Fifth Amendment, the Speedy Trial Clause of the Sixth Amendment, and the Due Process Clause of the Fifth Amendment.

First, as to double jeopardy: It was a violation of the Double Jeopardy Clause for the district court in September 1954 to impose a prison sentence on petitioner after having previously determined in October 1952 that petitioner should not be subject to imprisonment or probation for the offense committed under 18 U.S.C. § 1702. Unlike certain other statutes, the statute which is here involved, 18 U.S.C. § 1702, does not fix some minimum penalty which limits the trial court's discretion; the statute says instead that the offender shall be fined not more than $2,000 or imprisoned not more than five years, or both. The statute thus does not purport to require that the judge impose any term of imprisonment, or any term of probation in lieu of imprisonment; no minimum penalty is prescribed by law. Accordingly, the judge's determination, made when petitioner was present in open court on October 3, 1952, that no imprisonment and no probation should be imposed, was a judgment lawfully disposing of the case; by its very nature, it was a judgment executed immediately; and thereafter it was beyond the judge's authority to modify the judgment in a manner adverse to petitioner. The Double Jeopardy Clause clearly affords protection against a second and more severe sentencing, just as it affords protection against a

second trial for the same offense, and it stood as a bar to the prison sentence imposed in September 1954.

Second, as to the Speedy Trial Clause: The Solicitor General has already acknowledged that the purported probation order of the district court, pronounced and entered in October 1952 at a time when petitioner was no longer present before the district court, was invalid. However, the Solicitor General has suggested that, even if this invalid order is totally disregarded and treated as a nullity, the case would then merely have been an uncompleted case on the docket of the district court, which that court had power to complete by pronouncing sentence "initially" in September 1954. But such a lapse of two full years between the date of plea of guilty and the date of sentence would constitute not merely an inexcusable violation of Rule 32(a) of the Federal Rules of Criminal Procedure, which directs that sentence be imposed without unreasonable delay; it also would constitute a grave violation of petitioner's right under the Sixth Amendment to a "speedy trial". Both the purpose and the plain meaning of the Speedy Trial Clause of the Sixth Amendment support the conclusion that the sentencing hearing is an integral part of the "trial", as the word "trial" is used in this important clause of the Bill of Rights. In the present case the undisputed facts show that no justification existed for such an extraordinary delay, and that because of the unconscionable lapse of time the proceedings should have been brought to a halt without imposing a prison sentence on petitioner.

Third, as to the Due Process Clause: On any possible interpretation of the facts recited in detail in the Statement of the Case, it is evident that the Government and the district court indulged in a course of conduct not merely irregular but highly arbitrary and unfair. This course of conduct, for which the district court and the Government together must share the responsibility, cannot be deemed

consistent with principles of fundamental fairness. When petitioner was brought back before the district court in September 1954, after having been kept unlawfully under probation surveillance for nearly two full years, it should have been plain to the district court that the fundamental principles of justice required that petitioner be released rather than sentenced to prison.

The foregoing is an outline of the constitutional grounds on which petitioner is entitled to prevail. Even apart from these constitutional considerations, however, the imposition of a prison sentence upon petitioner in September 1954 was such a serious departure from proper standards of criminal law administration as to require corrective action. Petitioner's case has been characterized, practically from beginning to end, by the use of exceptionally illegal procedures employed in a manner adverse to his interests, as well as by the virtually total disregard of vital safeguards made mandatory by the Federal Rules of Criminal Procedure. Time and again this Court has held that in federal criminal cases the federal courts must be concerned with more than merely the bare minimum standards required by the Constitution. Because this case discloses such far-reaching departures from proper standards of criminal law administration, and because the application of proper standards would have prevented the imposition of a prison sentence on petitioner in September 1954, a compelling basis exists for reversing the judgment without even reaching the constitutional grounds which are being urged.

ARGUMENT

I

BY VIRTUE OF THE FIFTH AMENDMENT'S PROHIBITION AGAINST DOUBLE JEOPARDY, IT WAS UNCONSTITUTIONAL FOR THE DISTRICT COURT IN SEPTEMBER 1954 TO IMPOSE A PRISON SENTENCE ON PETITIONER AFTER HAVING PREVIOUSLY DETERMINED IN OCTOBER 1952 THAT PETITIONER SHOULD NOT BE SUBJECT TO IMPRISONMENT, OR TO PROBATION IN LIEU OF IMPRISONMENT, FOR THIS OFFENSE.

The disposition of petitioner's case which was made when petitioner appeared in open court on October 3, 1952, has already been set forth in full (pages 6-10, above). From the facts recited it is clear that the trial judge in open court determined that neither imprisonment nor probation should be imposed upon petitioner. For reasons which the judge deemed sufficient, he made a decision in open court to leave petitioner free of both imprisonment and the threat of imprisonment for this offense. And it is the judge's determination as made in open court which constitutes the authoritative disposition of petitioner's case; as held in *Spriggs* v. *United States*, 225 F.2d 865, 868 (9th Cir. 1955), "The order of the court is the pronouncement made by the judge in open court." Accord: *Watkins* v. *Merry*, 106 F.2d 360, 361 (10th Cir. 1939); *Wilson* v. *Bell*, 137 F.2d 716, 720 (6th Cir. 1943); *United States* v. *Whitehead*, 64 F. Supp. 57, 58 (E.D. Ky. 1946).

It was plainly within the lawful authority of the trial judge to decide—as he did—that neither imprisonment nor probation should be imposed upon petitioner. There are few doctrines so well settled in our federal criminal law as the doctrine that the punishment imposed, provided it is within the limits set by the statute, rests in the exclusive discretion of the trial judge. *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *United States* v. *Rosenberg*, 195

F.2d 583, 604-607 (2d Cir. 1952); *Rosenberg* v. *United States*, 346 U.S. 273, 293 (1953). "The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function." *Hill* v. *Wampler*, 298 U.S. 460, 464 (1936). "At the time of entering a judgment of conviction, the district judge is in the best position to fix the terms of a convict's sentence". *Affronti* v. *United States*, 350 U.S. 79, 83-84, note 13 (1955). The discretionary authority thus vested in the trial judge is vast indeed, giving him the power to make a just disposition in the light of all the circumstances known to him at the time the case comes before him for sentencing. Compare *Williams* v. *New York*, 337 U.S. 241, 247 (1949). And throughout the long course of federal decisions there will be found no serious suggestion that this vast discretionary authority does not include the power to determine, where such a determination is consistent with the statute, that no imprisonment at all is to be imposed. "The responsibility for degree of sentence is wholly within the power of the trial court, provided it does not exceed the declared legal maximum." *Russell* v. *United States*, 119 F.2d 686, 689 (8th Cir. 1941).

Moreover, the statute involved in the present case, 18 U.S.C. § 1702, is not one where the Congress has prescribed some minimum fixed penalty. Thus it differs markedly from statutory provisions such as the five-year minimum imprisonment fixed by Revised Statutes § 5209, which was involved in *Ex Parte United States*, 242 U.S. 27 (1916), where this Court decided that in such a case, there having been no federal probation statute as yet enacted, the trial judge was without power to suspend permanently the five-year minimum imprisonment which the Congress had directed to be served.[7] Similarly, it differs markedly from

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[7] In its opinion this Court was careful to state that the five-year sentence, execution of which the trial judge had suspended after imposing the sentence upon the defendant, was "the shortest term

the five-year minimum imprisonment fixed by 12 U.S.C. §588b(b), which was involved in *Wilson* v. *United States*, 145 F.2d 734 (9th Cir. 1944); or the unalterable twenty-five year imprisonment fixed by the last clause of 18 U.S.C. § 2117, whose predecessor (the former 18 U.S.C. § 320) was involved in *Hunter* v. *United States*, 149 F.2d 710 (6th Cir. 1945). Here, on the contrary, the statute, 18 U.S.C. § 1702, says that the offender "shall be fined not more than $2,000 or imprisoned not more than five years, or both." No minimum whatsoever is fixed, below which the trial judge may not go. The very discretion which the Congress had withheld from the trial judge in the statute which gave rise to *Ex parte United States*, supra, it has conferred upon him here. The present statute does not by its words purport to require that the judge impose any term of imprisonment, or any term of probation in lieu of imprisonment. To apply this Court's language in *Hill* v. *Wampler*, supra, 298 U.S. at 464, a term of imprisonment or probation are penalties imposed under this statute only, "if at all, because the consequence has been prescribed in the imposition of sentence." Accordingly, when the judge determined in

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which under the statute could have been imposed upon him" (242 U.S. at 37), that the punishment was "fixed by law" through a "plain legislative command fixing a specific punishment" (242 U.S. at 42). That this five-year minimum imprisonment fixed by the statute was at the root of the controversy in *Ex parte United States* will also be seen from pages 48-52 of the Brief for the Respondent filed on behalf of the respondent judge (Killits, J.) in that case, as well as from the Reply of the United States to Return of Respondent, pages 19-20, where the Government took to task the respondent judge "who found it consonant with his oath not to resign but rather to refuse to impose the minimum penalty decreed by law, and to name a lesser one, unauthorized save by his own decree"; and again, at page 22, where the Government replied to one of the respondent judge's contentions by arguing: "Really this contention amounts to this: that, because in his opinion minimum penalties are unwise, courts should lend themselves to blocking the enforcement of such laws until Congress shall be moved to repeal them"; and see also pages 25, 27-28 thereof.

open court that no imprisonment and no probation should be imposed upon petitioner, the judge's action was wholly in accordance with law.

Having been wholly in accordance with law, it constituted a final and binding determination by the trial judge to the effect that no imprisonment and no probation should be imposed. The Sixth Amendment's protection against double jeopardy includes protection against a second and more severe sentencing. *Ex parte Lange*, 18 Wall. 163 (1874); *In re Bradley*, 318 U.S. 50 (1943); *United States* v. *Benz*, 282 U.S. 304, 307 (1931). "The federal courts have no power to increase a sentence fixed by a valid judgment." *Rutledge* v. *United States*, 146 F.2d 199, 200 (5th Cir. 1944). Upon determining in open court that no imprisonment and no probation should be imposed, the trial judge had completed his judicial disposition of the case. The matter is governed by what this Court said in *Ex parte Lange*, supra, 18 Wall. at 179:

> "The court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution and by the dearest principles of personal rights, which both of them are supposed to maintain."

By its very nature the initial judgment in the present case was one which was immediately satisfied; the subsequent attempt to amend the judgment "was a nullity". (*In re Bradley*, supra, 318 U.S. at 52).

Nothing contrary to petitioner's position will be found in *Bozza* v. *United States*, 330 U.S. 160, 165-167 (1947). The *Bozza* case involved a statute—then denominated 26 U.S.C. § 2833(a) of the 1940 edition of the United States Code—which, entirely unlike the present statute, specified minimum sentences by providing that the offender "shall, for

every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years." Under that type of statute this Court held that the trial judge might, five hours after originally pronouncing a sentence which was less than the legally prescribed minimum, correct his error by recalling the defendant and counsel into court and resentencing the defendant. *Bozza* has no application in the present case. It is plainly distinguishable on a number of important grounds; among them are the facts that here the statute does not prescribe any minimum punishment; that here the judge's initial action was wholly lawful and within his power; that here the judge's second action was in no sense an effort to correct an earlier mistake or unlawful action, but rather was an attempt to change, in a manner highly unfavorable to petitioner, the effect of the lawful judgment already pronounced; and that here the judge in any event made no effort to bring petitioner back before him immediately [8] but waited nearly two years before doing so.

A word should be added concerning the federal statutory provisions relating to probation, 18 U.S.C. § 3651. Nothing in the Probation Act purports to limit or curtail the authority of the trial judge, under a statute such as the present, to determine that neither imprisonment nor probation should be imposed. Nor does anything in the Probation Act purport to qualify or to redefine the constitutional safeguard against double jeopardy. Indeed, this Court

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[8] Accordingly, it would appear that this Court is not required now to consider the correctness of the few court of appeals decisions which have held that, so long as the defendant has not yet left the courthouse after the initial sentencing, the trial judge may, at least under certain circumstances, still recall the defendant to the courtroom and increase the sentence. *Walton* v. *United States*, 202 F. 2d 18 (D.C. Cir. 1953); *Rowley* v. *Welch*, 114 F. 2d 499 (D.C. Cir. 1940); *DeMaggio* v. *Coxe*, 70 F. 2d 840 (2d Cir. 1934); cf. *Nichols* v. *United States*, 106 Fed. 672 (8th Cir. 1901).

has expressly determined that—even in cases where (unlike the present case) the defendant has been duly placed on probation—the Probation Act by its terms does not authorize that a sentence, which has been imposed before probation and its execution suspended, should be set aside and increased upon revocation of probation. *Roberts* v. *United States,* 320 U.S. 264 (1943). The interpretation given to the Probation Act thus reinforces the conclusion that, in the light of the proceedings which took place when petitioner was present in open court in October 1952, the trial judge had no power in September 1954 to decide that a new punishment should be imposed on petitioner by sending him to prison.

II

THE IMPOSITION OF A PRISON SENTENCE IN SEPTEMBER 1954, SUCH A LONG TIME AFTER THE PLEA OF GUILTY ENTERED IN SEPTEMBER 1952, VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT TO A SPEEDY TRIAL.

The position taken by the Solicitor General in the Memorandum in Opposition to the Granting of the Petition for Certiorari (page 3) was that, conceding the accuracy of petitioner's factual allegations, nevertheless no judgment had been pronounced when petitioner was before the trial judge in October 1952, the case remained uncompleted, and therefore the district court possessed a continuing jurisdiction which authorized it in September 1954 to impose a prison sentence as the initial judgment in an otherwise uncompleted case. For reasons which are set forth elsewhere in this Brief (pages 6-10, and 21-26), it is petitioner's position that a wholly lawful and definitive judgment was in fact pronounced while he was present in court in October 1952 and that accordingly the case did not continue as an uncompleted case.

But even if, for sake of the argument, we assume with the Solicitor General that in October 1952 the case remained as an uncompleted case in which no final disposition had been made, it by no means follows that the district court would have been authorized to impose a sentence on petitioner as late as September 1954. To the contrary, the wholly unjustifiable lapse of more than two full years between the date of the plea of guilty and the date of the sentence would in any event have deprived the court of its power to impose a prison sentence.

We may take note of the fact that Rule 45(c) of the Federal Rules of Criminal Procedure has modified earlier federal practice so as to provide that "The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding." But this Court has already held that "The Rules, in abolishing the term rule, did not substitute indefiniteness". *United States* v. *Smith*, 331 U.S. 469, 473, note 2 (1947). Rule 32(a) of the Federal Rules of Criminal Procedure expressly makes it mandatory that "Sentence shall be imposed without unreasonable delay." Surely, under the shocking circumstances disclosed by the present record, no contention will now be heard from the Government to the effect that the more than two years which elapsed between September 8, 1952, when petitioner pleaded guilty, and September 21, 1954, when the two-year prison sentence was imposed, could be deemed anything other than an "unreasonable delay."

The violation involved in the present case cuts much deeper, it is submitted, than a violation of Rule 32(a) alone. Because of this inexcusable lapse of a long period of time, the imposition of a prison sentence in September 1954 was also in direct contravention of petitioner's constitutional right to a speedy trial—a basic right guaranteed by the

Sixth Amendment's provision that "the accused shall enjoy the right to a speedy and public trial".[9] Recently this Court has made it clear that, where it appears that the constitutional right to a speedy trial has been seriously infringed, further proceedings in the criminal case shall be brought to a halt. *United States* v. *Provoo*, 350 U.S. 857 (1955), affirming *Petition of Provoo*, 17 F.R.D. 183 (D. Md. 1955). On the undisputed facts which exist in the present case, this principle should have stood as a bar to the imposition of a prison sentence when petitioner was brought before the district court in September 1954.

The sentencing hearing, we submit, is an integral part of the criminal "trial," as the word "trial" is used in the clause of the Sixth Amendment here being invoked. This is a question which, it is true, does not appear to have been previously decided by the Court. But both the purpose of the Speedy Trial Clause and the plain meaning of its text provide full support for the conclusion.

The great purpose of this clause of the Sixth Amendment, to protect citizens against the oppression and the injustice of undue delay, applies to sentencing as well as

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[9] The Solicitor General has placed some reliance on *Miller* v. *Aderhold*, 288 U.S. 206, 211 (1933). But there it appeared, among other things, that the lapse of time between the date of the plea of guilty (December 10, 1930)—which was accompanied by a sentence suspension that this Court assumed, without deciding, to be void—and the date of the imposition of a prison sentence (June 17, 1931) was much shorter, being less than six months. Perhaps for this reason no contention was made in the *Miller* case that the defendant's constitutional right to a speedy trial had been violated, and accordingly this Court was not called upon to consider any such question. Moreover, the *Miller* case arose long before the adoption of the mandatory requirement of Rule 32(a) of the Federal Rules of Criminal Procedure, which established a uniform standard for the federal courts.

to earlier portions of the trial.[10] The textual aspects will be illumined by an example relating to the accompanying constitutional requirement that the trial must be "public": If a federal trial judge were to exclude the public from a sentencing hearing and to impose a sentence upon the defendant in secret session, certainly it would be undeniable that the constitutional right to a "public trial" had been fundamentally violated. Compare *In re Oliver*, 333 U.S. 257, 258-273 (1948).[11] And when the Sixth Amendment guarantees "the right to a speedy and public trial", the word "trial" can hardly be given a more restrictive interpretation in conjunction with one of its modifying adjectives ("speedy") than is required in conjunctive with its other modifying adjective ("public").

Indeed, no reason at all appears which would warrant excluding the sentencing part of a criminal prosecution from the guaranty of a speedy trial, particularly in the light of the principle that this important guaranty in the Sixth Amendment "must be liberally construed". *United States* v. *Henning*, 15 F.2d 760, 761 (9th Cir. 1926). As the Fifth Circuit has indeed recognized in connection with the Sixth Amendment's guaranty of a speedy trial, "It is true that a trial is not complete until sentence is passed, and that the record cannot be held open unreasonably."

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[10] See also the "oft-quoted definition" relied on in *Petition of Provoo*, supra, 17 F.R.D. at 197, to the effect that a speedy trial as provided by the Sixth Amendment means a trial "free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice."

[11] See also the decisions so indicating under requirements imposed by state laws. *Wright* v. *The State*, 103 Ala. 95, 96, 15 So. 506, 507 (1894); *Harris* v. *State*, 46 So.2d 928 (Miss. 1950); *State* v. *Nathans*, 49 S.C. 199, 226, 27 S.E. 52, 62 (1897); *State* v. *Pioneer Press Co.*, 100 Minn. 173, 177, 110 N.W. 867, 869 (1907); *Reed* v. *The State*, 147 Ind. 41, 43-45, 46 N.E. 135, 136 (1897); cf. *Aspden's Appeal*, 24 Pa. 182, 184 (1854).

Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937). While the right to a speedy trial "is necessarily relative" and "depends upon circumstances", *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905), there are no circumstances disclosed by the undisputed facts of the present case which would justify the delay of more than two years which occurred between the plea of guilty in September 1952 and the imposition of a prison sentence in September 1954.

III

THE IMPOSITION OF A PRISON SENTENCE IN SEPTEMBER 1954 DEPRIVED PETITIONER OF HIS LIBERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

On any possible interpretation of the facts disclosed by this record, it is evident that the Government and the district court indulged in a course of conduct not merely irregular but highly arbitrary. As the facts have shown (pages 6-10, above), petitioner left the courtroom on October 3, 1952, with a wholly justified basis for his understanding that no imprisonment and no probation had been imposed for the offense. Nevertheless, the trial judge thereafter, in petitioner's absence and on *ex parte* prompting from the Government, changed his mind and purported to decree that imposition of sentence be suspended and petitioner be placed on probation for a period of three years. As a result of this purported order—the invalidity of which the Solicitor General has conceded—petitioner was unlawfully kept under probation surveillance for a period of nearly two full years and was then arrested at the Government's instigation for violating the conditions of the purported probation. The trial judge, in the September 1954 hearing which disregarded procedural safeguards intended to protect a defendant's rights at such a hearing (see pages 13-16, above), used this alleged violation of the wholly in-

valid probation order as the excuse for imposing upon petitioner a two-year prison sentence for the original offense.

Such an extraordinary course of conduct, for which the district court and the Government together must share the responsibility, can hardly be deemed consistent with the "fundamental fairness essential to the very concept of justice", *Lisenba* v. *California*, 314 U. S. 219, 236 (1941), which constitutes due process of law. The record in the present case discloses a course of "conduct that shocks the conscience", *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Fundamental fairness required that, when petitioner was brought back before the trial judge in September 1954, an order should have been entered to the effect that no term of imprisonment could properly be imposed. Indeed, if proper standards of criminal law administration had been followed by the district court and by the Government, this case could never have been brought back before the trial judge in September 1954. When it was, the judge's duty to release petitioner, rather than to sentence him to the penitentiary, was clear.

IV

EVEN APART FROM CONSTITUTIONAL CONSIDERATIONS, THE IMPOSITION OF A PRISON SENTENCE UPON PETITIONER IN SEPTEMBER 1954 WAS SUCH A SERIOUS DEPARTURE FROM PROPER STANDARDS OF CRIMINAL LAW ADMINISTRATION AS TO REQUIRE CORRECTIVE ACTION.

Points I, II and III of the Argument have set forth the reasons why the imposition of a prison sentence upon petitioner in September 1954 violated petitioner's constitutional rights under the Double Jeopardy Clause of the Fifth Amendment, under the Speedy Trial Clause of the Sixth Amendment, and under the Due Process Clause of the Fifth Amendment. In the course of setting forth these constitutional grounds for reversal, it has also been made clear

that the facts of this record disclose exceptionally grave departures from the proper standards which are applicable throughout the federal courts.

On this record it is apparent that the actions of the federal authorities and the district court—actions which, at best, must be ascribed to extreme carelessness—in this case transformed the administration of the criminal law into an instrument of oppression and injustice against petitioner. The facts have shown the way in which the determination made by the trial judge when petitioner was present in open court was thereafter repudiated by the judge through illegal measures taken in petitioner's absence. They have shown how petitioner was unlawfully kept subject to probation surveillance for nearly two full years and then was brought back before the court in September 1954 because it was alleged he had violated a probation order which, it is now admitted, was not lawful.

In a government of laws it should have been recognized immediately, at the time petitioner was thus brought back before the trial judge in September 1954, that nearly two years of unlawful probation surveillance had been more than enough unlawful punishment, and that in view of the history of this case it would be an exceptional abuse of judicial process for petitioner to be sent to prison. Yet the trial judge nevertheless proceeded to impose a two-year prison sentence; and in the course of doing so, he totally disregarded virtually all the safeguards which the Federal Rules of Criminal Procedure have specified for the protection of a defendant (see pages 13-16, above)—including, if the Solicitor General's position be accepted *arguendo*, the requirement of Rule 32(a) that "Sentence shall be imposed without unreasonable delay" (see page 27, above).

On such a record, it may well be deemed most appropriate that the case should be decided in petitioner's favor without reaching the constitutional questions.

Time and again this Court has emphasized that in criminal cases the federal courts are not to keep the standards down to the bare minimum which would be required by constitutional guaranties. As the Court said in *McNabb* v. *United States*, 318 U. S. 332, 340 (1943):

> ". . . the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

See also *Ballard* v. *United States*, 329 U.S. 187, 193 (1946); *Upshaw* v. *United States*, 335 U.S. 410 (1948); *United States* v. *Carignan*, 342 U.S. 36, 41-43 (1951); *Brown* v. *Allen*, 344 U.S. 443, 476 (1953); *Offutt* v. *United States*, 348 U.S. 11 (1954); *Rea* v. *United States*, 350 U.S. 214, 216-218 (1956). It is not merely the minimum "rock-bottom requirements" of the Constitution which are of concern when a federal criminal case is under review. *Delaney* v. *United States*, 199 F. 2d 107, 113 (1st Cir. 1952).

These principles furnish a proper guide for the disposition of the present case. Moreover, they are fortified by another principle, which found expression in *Frankel* v. *United States*, 131 F.2d 756, 758 (6th Cir. 1942), that "Respect for and confidence in the judicial process would seem to demand that a court keep faith even with the most venial of those subject to its decrees." Or, as this Court itself has said, "justice must satisfy the appearance of justice".

Offutt v. United States, supra, 348 U.S. at 14; *In re Murchison*, 349 U.S. 133, 136 (1955).

Since the trial judge's imposition of a prison sentence upon petitioner in September 1954 involved such far-reaching departures from the proper standards for the administration of the criminal law, effective corrective action by this Court is accordingly called for, even apart from the constitutional grounds which have been argued. The prison sentence unlawfully imposed has been fully served by petitioner; hence the time which petitioner spent improperly confined in a federal penitentiary is now beyond recall. But as a matter of fairness the district court should be directed to enter an order clearly showing that a prison sentence ought not to have been imposed.

CONCLUSION

The essential facts of this case are not in dispute. They disclose that petitioner has been the victim of serious injustice and oppression. Moreover, primarily because of the slowness with which the case has moved through the courts, combined with the failure of both the district court and the court of appeals to recognize the manifest errors committed, petitioner completed the service of this illegally imposed sentence shortly after the writ of certiorari was granted by this Court. On the undisputed facts, and as a matter of simple justice to petitioner, the order of the district court which denied petitioner's motion to vacate should now be reversed by this Court, such reversal to be accompanied by a direction that the district court enter an order which will declare clearly and unequivocally (1) that no sentence should have been imposed on petitioner when he was brought before the district court in September 1954, and

(2) that, upon the entry of such order, the case is to be deemed closed upon the records of the district court.

Respectfully submitted,

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